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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TODD STRAND, Defendant and Appellant.	B293879 (Los Angeles County Super. Ct. No. NA104177)

APPEAL from an order of the Superior Court of Los Angeles County, Jesse I. Rodriguez, Judge. Affirmed; remanded with instructions.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Todd Strand appeals from an order revoking his probation after the trial court found him in violation of probation. On appeal, Strand contends he was denied his due process right to confront his accusers because the court relied on hearsay evidence at the probation revocation hearing without finding good cause to excuse live testimony.

Strand also argues the trial court denied his right to due process, as set forth in this court's opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), by imposing court assessments, a laboratory fee, and restitution fines without first determining if he had the ability to pay. We affirm the court's order revoking Strand's probation but remand for the trial court to allow Strand to request a hearing and present evidence demonstrating his inability to pay the court assessments, laboratory fee, and restitution fines imposed by the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Strand's Prior Conviction and First Probation Violation*

On May 2, 2017 Strand pleaded no contest to two counts of sale or transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); counts 1 & 2) and possession of methamphetamine for sale (§ 11378; count 3). Pursuant to the plea agreement, the trial court imposed and suspended a sentence of five years eight months to be served in the county jail.[1] The court placed Strand on formal probation on the condition he complete a one-year in-patient drug treatment

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[1] Although the court stated it stayed the sentence, it appears it imposed and suspended execution of the sentence.

program at the Tibis House. Strand enrolled in the Tibis House on June 2, 2017.

On November 16, 2017 Strand's probation was revoked for his failure to report to probation and three positive drug tests. Strand failed to appear in court for the probation violation hearing, and the court issued a bench warrant. The Tibis House program filed a letter with the court on January 2, 2018 advising that Strand had been terminated from the Tibis House on December 23. Strand was picked up on the bench warrant, and on January 22, 2018 he was remanded into custody. At a March 27, 2018 probation revocation hearing, Strand asserted he was not able to continue the labor-intensive program at the Tibis House due to a fractured ankle. The trial court reinstated probation and ordered Strand to compete a six-month live-in program at the Salvation Army Bell Shelter. The court admonished Strand, "[I]f the food is too good or not good enough, if it's high calorie or low calorie, if it's whatever it is, if they don't like him, too bad. If he doesn't like them, too bad. Whatever it is, short of a natural disaster, he cannot leave the program until he talks to [his attorney, Nima Farhadi], and [Farhadi] come[s] to court and then [Farhadi] tell[s] us what's going on. And then we can . . . change some of the requirements in this case so that he can conclude doing the six month in-patient, which was initially one year . . . ." The court ordered Strand to report to probation.

B. *The Second Probation Violation*

On June 11, 2018 Deputy Probation Officer Ronald Jackson issued a report setting forth two grounds for Strand's violation of probation: First, Strand was discharged from the Bell Shelter before he completed the treatment program, and, second, Strand

tested positive for methamphetamine during his probation. Jackson stated in the report for the hearing that Strand "failed to complete a six-month live-in program at the Salvation Army." Strand was given notice of a probation violation hearing to be held on July 16, but he failed to appear in court. The court again summarily revoked his probation.

C. *The Probation Violation Hearing*

Strand's probation violation hearing was held on August 30, 2018. Jackson testified at the hearing he became Strand's probation officer in March 2018, when Strand started his program at the Bell Shelter. Since then, Strand only reported to Jackson once, on May 11, 2018. During that visit Jackson collected a urine specimen, which a laboratory retrieved and tested. The test was positive for methamphetamine.[2]

On June 8, 2018 Jackson called the Bell Shelter and spoke with a woman named Sheila, who told Jackson that Strand had been discharged from the program on June 4. The program later faxed Jackson a letter explaining the discharge. Although Jackson testified as to the contents of the letter, the letter was not admitted into evidence.[3] Strand's attorney objected to

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[2] At the hearing, defense counsel objected to this testimony based on lack of foundation, chain of custody, and multiple layers of hearsay because Jackson was not the one who conducted the test. The court overruled the objection.

[3] The trial judge stated at the hearing, "I have a written letter from the Salvation Army saying that on [June 4, 2018] [Strand] was discharged from the program." However, Strand asserts on appeal the letter was never provided to him, marked for identification, or offered into evidence by any party. The

Jackson's testimony based on lack of foundation, multiple layers of hearsay, and speculation, but the court overruled the objection. Jackson testified he spoke with Strand on June 28, 2018, and Strand "told [him] that he was in another program . . . ." During the call Jackson informed Strand he needed to attend a court hearing on July 16 on his potential violation of probation.

Strand did not call any witnesses. His attorney argued the People had not proven a probation violation because Jackson's testimony was not sufficient to prove Strand left the program and the test results were based on hearsay and lacked foundation. Strand's attorney also argued a finding Strand violated his probation by failing to report to probation would violate his due process rights because he was not given notice of that violation. When the court inquired of Strand's attorney whether Strand had proof of completion of the program, the attorney responded, "I don't think that's my burden of proof . . . ." He later added, "Clearly, if we had proof that he completed the program, the court would have that."

The trial court found Jackson was a credible witness and stated it "believe[d] that he talked to [Strand]." The court found three violations of probation: (1) failure to appear in court, (2) failure to complete the drug treatment program, and (3) Strand's expulsion from the program. With respect to the third violation, the court relied on the letter from the Bell Shelter stating Strand was discharged from the program on June 4, 2018. The court did not consider the positive drug test as a basis for finding a violation of probation because it was not "convinced . . . beyond a

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People do not argue otherwise, and the letter is not included in the appellate record.

reasonable doubt that [the testing laboratory] followed all of the rules and regulations . . . ." The court imposed the suspended sentence of five years eight months in county jail. The court imposed a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), a $30 criminal conviction assessment (Gov. Code, § 70373), a $50 laboratory fee (Health & Saf. Code, § 11372.5), $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), and a parole/postrelease supervision restitution fine in the same amount, which the court stayed (Pen. Code, § 1202.45).[4]

Strand timely appealed.

DISCUSSION

A. *Revocation of Probation and Standard of Review*

"At any time during the period of supervision of a person . . . released on probation under the care of a probation

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[4] The trial court on remand should clarify the amount of fines, fees, and assessments it imposes (if any). At the probation revocation hearing the court stated it imposed the "mandatory minimum fines," but ordered a $30 court operations assessment and a $40 criminal conviction assessment, inadvertently reversing the mandatory amounts of the assessments. The court also imposed one assessment under each code provision instead of an assessment on each count as provided by the statutes (Pen. Code, § 1465.8, subd. (a)(1) [criminal conviction assessment]; Gov. Code, § 70373 [court operations assessment]). At the initial sentencing, by contrast, the court had imposed an assessment on each count, totaling $120 in court operations assessments and $90 in criminal conviction assessments. To complicate matters, the minute order and abstract of judgment entered following the probation revocation hearing reflect imposition of restitution fines but not the assessments or a laboratory fee.

officer . . . the court may revoke and terminate the supervision of the person if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the person has violated any of the conditions of their supervision . . . ." (Pen. Code, § 1203.2, subd. (a); accord, *People v. Leiva* (2013) 56 Cal.4th 498, 505.) The People must prove a violation by a preponderance of the evidence. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197 (*Shepherd*); *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066 (*O'Connell*).)

A trial court has "very broad discretion in determining whether a probationer has violated probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443.) We generally review a trial court's decision to admit or exclude evidence in a probation revocation hearing for an abuse of discretion. (*Shepherd, supra*, 151 Cal.App.4th at p. 1198; *O'Connell, supra*, 107 Cal.App.4th at p. 1066.) However, when the defendant's constitutional rights are implicated, courts have reviewed de novo the admissibility of evidence at a probation revocation hearing. (*People v. Cromer* (2001) 24 Cal.4th 889, 901 [de novo review applies to consideration of whether defendant's confrontation rights were violated]; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 78 [reviewing de novo whether due process balancing test applied to statements falling within hearsay exception for spontaneous statements]; see *People v. Arreola* (1994) 7 Cal.4th 1144, 1148 (*Arreola*) [trial court "admitted erroneously" preliminary hearing transcript in lieu of live testimony at probation revocation hearing in violation of defendant's due process rights]; but see *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1392 (*Kentron D.*) [applying abuse of discretion standard to due process challenge to

finding of probation violation based on hearsay statements in probation report].)

B. *Applicable Legal Principles*

Hearsay evidence is only admissible if it falls within an established exception to the hearsay rule. (Evid. Code, §§ 1200, subds. (a) & (b), 1201.) However, as the United States Supreme Court observed in *Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*), "[T]he revocation of parole [or probation] is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole [or probation] revocations."[5] (Accord, *People v. Winson* (1981) 29 Cal.3d 711, 715 (*Winson*).)

Although not all constitutional rights apply to a probation or parole revocation hearing, "[i]t is fundamental that both the People and the probationer or parolee have a continued post-conviction interest in accurate fact-finding and the informed use of discretion by the trial court." (*Winson, supra*, 29 Cal.3d at p. 715; accord, *Shepherd, supra*, 151 Cal.App.4th at p. 1198.) Due process[6] therefore requires that a defendant at a probation

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[5] Revocation of probation is "constitutionally indistinguishable from the revocation of parole." (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782, fn. 3; accord, *Shepherd, supra*, 151 Cal.App.4th at p. 1198.)

[6] "Probation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies. [Citations.] Probationers' limited right to confront witnesses at revocation hearings stems from the due process clause of the Fourteenth Amendment, not from the Sixth Amendment." (*Johnson, supra*, 121 Cal.App.4th at p. 1411; accord, *Shepherd, supra*, 151 Cal.App.4th at p. 1199, fn. 2.)

or parole revocation hearing be afforded at a minimum: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (*Morrissey, supra*, 408 U.S. at p. 489; accord, *Arreola, supra*, 7 Cal.4th at pp. 1152-1153.)

Among the minimum procedures required by due process in a probation revocation hearing is "'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . .'" (*Winson, supra*, 29 Cal.3d at p. 716; accord, *Arreola, supra*, 7 Cal.4th at p. 1152.) Therefore, admission of former testimony at a probation revocation hearing as a weaker substitute for the witness's live testimony without a finding of good cause violates a defendant's due process right to confront and cross-examine adverse witnesses. (*Arreola*, at p. 1158.) As the Supreme Court explained in *Arreola*, in holding the trial court could not rely on the transcript of the defendant's preliminary hearing to find the defendant violated his probation, "[T]he opportunity of the accused to observe an adverse witness, while that witness testifies, is a significant aspect of the right of confrontation that may not be dispensed with lightly." (*Ibid.*)

The Courts of Appeal have found a victim's or witness's statements to a probation officer also fall in this category of

inadmissible hearsay absent a finding of good cause. (See *Shepherd, supra*, 151 Cal.App.4th at p. 1202 [trial court erred in admitting testimony from probation officer that administrator of drug treatment program informed him defendant was discharged from program for testing positive for alcohol consumption]; *In re Miller* (2006) 145 Cal.App.4th 1228, 1238-1240 [witness's hearsay statements to police officer recounted in probation report not admissible]; *Kentron D., supra*, 101 Cal.App.4th at pp. 1392-1393 [same].)

To rely on a substitute for live testimony, there must be a showing of good cause: "The broad standard of []'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Arreola, supra*, 7 Cal.4th at pp. 1159-1160.) "[I]n determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether instead the former testimony constitutes

the sole evidence establishing a violation of probation." (*Id.* at p. 1160.)

Although generally former testimony and witness statements are not permissible substitutes for live testimony, where "'appropriate,' witnesses may give evidence by document, affidavit or deposition. . . ." (*Winson, supra*, 29 Cal.3d at p. 719; see *Morrissey, supra*, 408 U.S. at p. 489 ["[T]he [parole revocation] process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."].) Documentary hearsay evidence may be admitted in a probation revocation hearing as long as "there are sufficient indicia of reliability regarding the proffered material . . . ." (*People v. Maki* (1985) 39 Cal.3d 707, 709, 717 [standard rental car invoice signed by defendant and corroborating hotel receipt were admissible to show defendant violated parole by leaving county without permission]; accord, *People v. Gomez* (2010) 181 Cal.App.4th 1028, 1034, 1038 [hearsay testimony by probation officer regarding contents of probation department's computer records and written report by second probation officer admissible to show defendant failed to report to probation, make restitution payments, and submit verification of employment and counseling because demeanor of witness was not necessary to authenticate computer records].)

As the Supreme Court in *Arreola* explained, "the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the

document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola, supra*, 7 Cal.4th at p. 1157; accord, *People v. Gomez, supra*, 181 Cal.App.4th at pp. 1035-1035.)

C. *The Trial Court Erred in Admitting Hearsay Evidence of Strand's Discharge from the Program Without Finding Good Cause To Excuse Live Testimony, but the Error Was Harmless*

Strand contends the trial court violated his due process right to confront and cross-examine adverse witnesses when it relied on Jackson's hearsay testimony, the probation report, and the letter from the drug treatment program without finding good cause to excuse live testimony. We agree but find the error harmless because Strand admitted to Jackson he was no longer in the program. Jackson's testimony about what Sheila told him and the contents of the letter from the program, as well as Jackson's conclusory statement in the probation report that Strand failed to complete the drug treatment program, do not fall within an established exception to the hearsay rule. Nor do they qualify as documentary hearsay evidence that is admissible in a probation revocation hearing under *People v. Maki, supra*, 39 Cal.3d at page 716. The trial court therefore erred in admitting the testimony in lieu of live testimony without finding good cause. (*Arreola, supra*, 7 Cal.4th at pp. 1159-1160.)

The People's reliance on *O'Connell, supra*, 107 Cal.App.4th at pages 1064 to 1065 is misplaced. In *O'Connell*, the trial court found the defendant in violation of his deferred entry of judgment program, based on a written report from the manager of a drug

counseling program stating the defendant had not completed any of the 20 required sessions and had been terminated from the program for excessive absences. (*Ibid.*) The court found the report had indicia of reliability because the report was in response to the court's referral and referenced the court file and sentencing procedure. (*Id.* at p. 1065.) The Court of Appeal affirmed, concluding the report was "akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings." (*Id.* at p. 1066.) By contrast, Jackson testified he had received a letter from the Bell Shelter program, but the letter was not provided to the attorneys or admitted into evidence.

The People's analogy to *People v. Abrams* (2007) 158 Cal.App.4th 396, 405, is likewise inapposite. There the probation officer testified based on the probation department's computer records that the defendant had not reported to probation or paid his required fines and fees. The probation officer provided foundational testimony regarding how the department logged in calls to the office and how the records showed the defendant had not called in. (*Ibid.*) The Court of Appeal concluded the probation officer's testimony was admissible as documentary evidence because it involved "records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead on the record of his or her own action.'" (*Ibid.*) Unlike *Abrams*, Jackson did not testify about routine matters about which the probation department would typically keep a record, but instead, recounted information in the possession of the Bell Shelter relayed by an out-of-court witness as to whether Strand had been discharged from the program.

The holding in *Shepherd, supra*, 151 Cal.App.4th at page 1202 is directly on point. There the probation officer testified at the probation revocation hearing that a program administrator at the defendant's treatment program informed him the defendant had been asked to leave the program after testing positive for alcohol. (*Id.* at p. 1198.) The administrator did not testify at the hearing, no other evidence supported her out-of-court statements, and it was not clear whether the administrator observed the defendant's alleged probation violation or was simply reporting what she was told by other unidentified persons at the program. (*Ibid.*) Thus, the hearsay evidence was a substitute for live testimony, and because there was no showing of good cause to excuse live testimony from the administrator, the admission of hearsay was improper. (*Id.* at pp. 1201-1202.)

Jackson's testimony here, as in *Shepherd, supra*, 151 Cal.App.4th at page 1202, *In re Miller, supra*, 145 Cal.App.4th at pages 1238 to 1240, and *Kentron D., supra*, 101 Cal.App.4th at pages 1392 to 1393, was a lesser substitute for the live testimony of a representative of the Bell Shelter. Further, the People made no showing Sheila or another witness from the Bell Shelter was unavailable to testify. Thus, the trial court's admission of Jackson's testimony denied Strand of his due process confrontation rights. Even under the more deferential abuse of discretion standard, the trial court abused its discretion in admitting this hearsay evidence.

Although the trial court erred, we agree with the People the error was harmless. Because the error is of federal constitutional dimension, we consider whether the error is harmless beyond a reasonable doubt. (*Arreola, supra*, 7 Cal.4th at p. 1161; see *Chapman v. California* (1967) 386 U.S. 18, 24 ["[B]efore a federal

constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."].)

While the trial court relied on the letter from the Bell Shelter program to find Strand had been expelled from the program, the court also found a separate violation for Strand's failure to complete the program. Jackson testified he spoke with Strand on June 28, 2018, and Strand told him "he was in another program . . . ." The trial court found Jackson's testimony credible and believed Jackson spoke with Strand. Strand's statement was admissible as an admission of a party opponent. (Evid. Code, § 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."].) When asked at the hearing whether Strand had proof of completion of the program, Strand's attorney initially responded it was not his burden to present that evidence, then added, "Clearly, if we had proof that he completed the program, the court would have that." In light of the fact Strand started a six-month program at the Bell Shelter in March 2018, the fact he was in a different program as of June 28, 2018 met the People's burden to prove Strand had not completed the Bell Shelter program. In addition, at the first probation revocation hearing the trial court admonished Strand he could not leave the Bell Shelter program for any reason. Strand could have presented proof of completion of the Bell Shelter program but failed to do so. On these facts, the court's erroneous admission of Jackson's hearsay testimony and consideration of the Bell Shelter letter was harmless beyond a reasonable doubt. (*Arreola, supra*, 7 Cal.4th at p. 1161; see *People v. Abrams, supra*, 158 Cal.App.4th at p. 399 [error in admission of probation report

was harmless where defendant admitted on cross-examination he had never reported in person to the probation department and did not contact the probation department with 48 hours of his release].)[7]

D. *Strand Is Entitled to an Ability-to-pay Hearing on the Fines and Assessments Imposed by the Court*

Strand contends the trial court violated his right to due process pursuant to this court's opinion in *Dueñas, supra*, 30 Cal.App.5th at page 1157 by failing to consider his ability to pay before imposing the court operations and criminal conviction assessments, laboratory fee, and restitution fines. The People concede and we agree due process requires the court to conduct an ability-to-pay hearing before imposing the nonpunitive assessments, including the assessments and laboratory fee, and we should remand for Strand to request a hearing.[8] In *Dueñas* this court concluded "the assessment provisions of Government

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[7] The People also contend any error was harmless because Strand violated his probation by failing to appear in court. But Strand's counsel objected at the hearing that Strand was not given notice of this potential violation. Due process requires a defendant be given "written notice of the claimed violations of his or her probation." (*Black v. Romano* (1985) 471 U.S. 606, 611-612; accord, *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173-1174 [reversing revocation of probation based on alternative basis for violation raised for first time during hearing.].) We therefore focus only on Strand's failure to complete the drug treatment program.

[8] The People do not specifically address the laboratory fee, but this would fall in the category of a nonpunitive fee.

Code section 70373 and Penal Code section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas*, at p. 1168; accord, *People v. Belloso* (2019) 42 Cal.App.5th 647, 654-655 (*Belloso*), review granted Mar. 11, 2020, S259755.)[9]

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[9] Several Courts of Appeal have applied this court's analysis in *Dueñas* (e.g., *People v. Santos* (2019) 38 Cal.App.5th 923, 929-934; *People v. Kopp* (2019) 38 Cal.App.5th 47, 95-96, review granted Nov. 13, 2019, S257844 [applying due process analysis to court assessments]; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1030-1035), or partially followed *Dueñas* (e.g., *People v. Valles* (2020) 49 Cal.App.5th 156, 162-163 [concluding due process requires ability-to-pay hearing before imposition of court facilities fee, not restitution fines]). Other courts have rejected this court's due process analysis (e.g., *People v. Cota* (2020) 45 Cal.App.5th 786, 794-795; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281; *People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946), or concluded the imposition of fines and fees should be analyzed under the excessive fines clause of the Eighth Amendment (e.g., *People v. Cowan* (2020), 47 Cal.App.5th 32, 42, review granted June 17, 2020, S261952; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1061; *Kopp* at pp. 96-97 [applying excessive fines analysis to restitution fines]). The Supreme Court granted review of the decision in *Kopp* to decide the following issues: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?"

But we disagree with the People's position that Strand is not entitled to an ability-to-pay hearing on the restitution fines. In contrast to court assessments, a restitution fine under section 1202.4, subdivision (b), "is intended to be, and is recognized as, additional punishment for a crime." (*Dueñas, supra*, 30 Cal.App.5th at p. 1169; accord, *Belloso, supra*, 42 Cal.App.5th at p. 655.) Section 1202.4, subdivision (c), expressly provides a defendant's inability to pay a restitution fine may not be considered as a "compelling and extraordinary reason" not to impose the statutory minimum fine. However, as this court held in *Dueñas*, to avoid the serious constitutional questions raised by imposition of a restitution fine on an indigent defendant, "although the trial court is required by Penal Code section 1202.4 to impose a restitution fine, the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172; accord, *Belloso*, at p. 655.)[10]

In light of Strand's burden to prove his inability to pay (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490), we remand the matter to the trial court to give Strand an opportunity to request an ability-to-pay hearing and to present evidence of his inability to pay the assessments and fines.

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[10] The People also argue we should assess the appropriateness of the restitution fine under the excessive fines clause of the Eighth Amendment instead of the due process clause of the Fourteenth Amendment. However, we rejected this argument in *Belloso, supra*, 42 Cal.App.5th at page 660, explaining, "We disagree with [the] conclusion a constitutional challenge to imposition of fines and fees on an indigent defendant should be analyzed under an excessive fines analysis instead of a due process framework."

DISPOSITION

The order revoking Strand's probation is affirmed. We remand for the trial court to allow Strand to request a hearing and present evidence demonstrating his inability to pay the criminal conviction and court operations assessments, laboratory fee, and restitution fines. If Strand demonstrates his inability to pay the assessments, the trial court must strike them. If the trial court determines Strand does not have the ability to pay the restitution fines, it must stay execution of the fines.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.